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In the Supreme Court of the United States

OCTOBER TERM, 1951

No.....

INTERNATIONAL TYPOGRAPHICAL UNION, WOODRUFF RANDOLPH, LARRY TAYLOR, ELMER BROWN and DON HURD, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No.....

CHICAGO TYPOGRAPHICAL UNION No. 16 and INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No.....

INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioner,*

v.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION and NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgments and decrees of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cases on February 11, 1952.

OPINIONS BELOW

The opinion of the National Labor Relations Board (R. 283) involved in No....., *International Typographical Union, et al.* v. *National Labor Relations Board,* and in No. ....., *International Typographical Union* v. *American Newspaper Publishers Association, et al.,* is reported at 86 N.L.R.B. 951. The Board's opinion (R. 339) involved in No. ....., *Chicago Typographical No. 16, et al.* v. *National Labor Relations Board,* is reported at 86 N.L.R.B. 1041.

The opinion of the Court of Appeals (R. 3053) is reported at 193 F.2d 782, sub nom. *American Newspaper Publishers Association* v. *National Labor Relations Board.*

JURISDICTION

The judgments and decrees of the Court of Appeals were entered on February 11, 1952 (R. 3097 ff.). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 8(b)(2) of the Labor Management Relations Act of 1947 applies in the absence of a showing that specific, identifiable employees or applicants were the actual objects of a discriminatory scheme.

2. Whether a union's effort to obtain contract conditions violates Section 8(b)(2) merely because the conditions create the possibility of discrimination by an employer at some indefinite future time.

3. Whether an international union can be a joint statutory bargaining representative with one of its locals where it has not been designated as such by the employees involved.

4. Whether a violation of the collective bargaining mandate of Section 8(b)(3) can occur where a union has not been requested to bargain by an employer.

5. Whether the statutory duty to bargain in good faith

precludes a party from making a proposal lawful on its face and capable of lawful application but which, if accepted, might in the future be found to have been used in an illegal manner.

6. Whether Section 8(b)(1)(B) can be violated merely by making a lawful demand that foremen be union members where no restraint or coercion was specifically directed toward that demand but where the demand was found to be part of an overall policy containing strike threats.

7. Whether, in light of Section 10(e), the Court of Appeals can order a remand to the Board on an issue that was not previously urged before the Board and on which there was no evidence or proffer of evidence.

STATUTE INVOLVED

The pertinent portions of the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 141, et seq., are as follows:

"Sec. 8(a) It shall be an unfair labor practice for an employer—

* * * * * * * * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

* * * * * * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) . . ."

STATEMENT

In November 1947 the General Counsel of the National Labor Relations Board (herein called the Board) issued a complaint alleging that the International Typographical Union (herein called the ITU) and its officers had been and were engaging in certain unfair labor practices in violation of the Labor Management Relations Act of 1947, 29 U.S.C. Sec. 141, et seq. (herein referred to as the Act). This complaint was based upon charges filed by the American Newspaper Publishers Association (herein called the ANPA) on behalf of various newspaper publishers located throughout the United States. This proceeding, which is the subject of the cases here entitled *ITU, et al.* v. *Labor Board,* and *ITU* v. *ANPA, et al.,* will be referred to herein as the ANPA proceeding.

In January 1948 the General Counsel of the Board issued another complaint against the ITU, naming in addition its Chicago local, Chicago Typographical Union No. 16 (herein called Local No. 16). This complaint grew out of charges filed by the Chicago Newspaper Publishers Association on behalf of newspaper publishers in Chicago. This proceeding, which gives rise to the case here entitled *Chicago Typographical Union No. 16, et al.* v. *Labor Board,* will be referred to herein as the Chicago proceeding.

For present purposes it is enough to note that the following charges were made in the two proceedings:

1. In the ANPA proceeding, it was alleged that the ITU and its officers had been and were violating Section 8(b)(2) of the Act by attempting to cause employers to discriminate against employees in violation of Section 8(a)(3). More specifically it was alleged that the ITU and its officers, directly and through subordinate ITU locals, in their dealings with employers (a) imposed conditions of employment, (b) demanded certain contract clauses and (c) refused to agree to any contract which was not terminable upon 60 days' notice—all with the design of accomplishing a violation of Section 8(b)(2).

2. In the Chicago proceeding, the Section 8(b)(2) charge was repeated and the additional allegation was made that the ITU and Local No. 16 had been and were violating the mandate of good faith collective bargaining contained in Section 8(b)(3) of the Act. The violation was said to consist of (a) an insistence upon imposing certain unilateral conditions of employment, (b) a refusal from August 22 to October 21, 1947, to enter into any agreement with the Chicago publishers, and (c) a refusal thereafter to negotiate or enter into any collective agreement except on certain conditions, including a 60-day cancellation clause.

3. In the ANPA proceeding, it was further alleged that the ITU and its officers had been and were violating Section 8(b)(1)(B) of the Act by demanding, directly and through subordinate locals, that employers hire only foremen who were ITU members.

The issues raised by these petitions are premised on relatively few, undisputed facts. Petitioners believe and urge that the voluminous facts heavily relied upon by the Trial Examiner, the Board and the Court of Appeals are, for the most part, irrelevant. Those facts have tended, by their volume and by the manner in which they have been arranged, to obscure the issues and to prejudice the result.

However, because of the importance attached to them by the tribunals below, petitioners present the following summary of those facts:

1. Prior to the passage of the Act in 1947, the ITU members worked only where all composing room employees, including the foremen, were union men. All members were bound by oath to use all honorable means "to procure employment for members of the International Typographical Union in preference to others" (R. 1617).

2. Reference to the internal laws of the ITU established that (a) subordinate local unions could be fined or suspended for violating ITU laws or mandates; (b) subordinate local unions were required to submit all contract proposals to the ITU President for review and approval as to compliance with ITU law prior to presentation to the employer; (c) a similar procedure was to be used as to all negotiated contracts prior to execution; (d) where a disagreement developed between a subordinate union and an employer, "which in the opinion of the local union may result in a strike," the local had to notify the ITU President (R. 1674); (e) upon such notification, the ITU President or his proxy was to investigate the cause of the disagreement and endeavor to adjust the difficulty; (f) if no agreement was then reached, the ITU Executive Council could approve a strike, in which event strike benefits from the ITU defense funds were payable to members of the striking local; (g) the policy of the ITU was made clear to the effect that all composing room work "belongs to and is under the jurisdiction of" the ITU, with the foreman being the only recognized authority in a union shop and being governed in the hiring and firing by the priorities established by ITU law.

3. Upon passage of the Act in June 1947 and prior to its effective date, August 22, 1947, the ITU engaged in an extensive effort to acquaint its locals and members with

their rights under the new law and to establish new patterns of action made necessary by the outlawing of closed shops. The Court of Appeals (R. 3060, 193 F.2d at 789) described this effort as one "for the apparent purpose of expressing its (ITU's) disapproval and defiance of the Act and for the further purpose of instructing its subordinate locals and members on methods of avoiding the impact of the various provisions of the Act on the traditional practices and policies of the ITU." This description was premised on quotations from such ITU sources as its official journal, its postcard bulletins to subordinate locals and its convention proceedings. The quotations pointed out that no law could compel ITU members to work under conditions not acceptable to them, that if they could not make a closed-shop contract they need not make any contract at all, and that if conditions prevailing in a shop were not to their liking they need not work in that shop (R. 2028). It was said that "We will maintain our right to work only with union men under any circumstances" (R. 1846). All of these quotations were made before the effective date of a new, complicated statute that had generated a bitter, emotional reaction on the part of organized labor. None of the remarks quoted were addressed to any employer nor did any of them refer to any specific employer or to any specific dispute between any employer or any subordinate local.

4. At its annual convention held from August 16 to 22, 1947, the ITU adopted a resolution approving the report of its committee on collective bargaining. This report denounced the statute as unconstitutional and unworkable, stated that the new law did not compel the signing of contracts, and declared that it would be ITU policy "to refrain from signing contracts in order that we avoid agreeing, or seeming to agree, or voluntarily accepting the conditions created by such a relationship under the Labor Management Act of 1947" (R. 2013). It was further stated:

"Upon the expiration of existing contracts, and until the laws above referred to are amended and free collective bargaining is again recognized, our members may accept employment only from employers who are willing to employ them under the 'Conditions of Employment' which the several unions adopt, after approval by the Executive Council of the I.T.U." (R. 2013). But the report also made clear that the ITU locals were to "engage in collective bargaining to the extent required by law" (R. 2014) and that "there should not be, and will not be, any attempt on the part of the international or subordinate unions to violate any valid provisions of this law, or of any law, federal or state" (R. 2013).

5. The "Conditions of Employment," to which the foregoing report referred, were then distributed by the ITU to its various locals in printed form. These "Conditions" were for use only on proper termination of then existing contracts and were to replace any signed, verbal or other kind of contract. The employer was asked to recognize that there was no obligation on the part of the local or its individual members to do other than specified in these unilaterally-declared "Conditions." The use of these "Conditions" was referred to in the proceedings as the "no contract policy" of the ITU. For a period of a few weeks no bilateral contract was approved by the ITU.

6. It was *not* found by the Trial Examiner that the "Conditions of Employment" form contained language unlawful under the statute. He affirmatively found (R. 121) that "under the ITU program, an employer was not asked to agree not to hire non-union men." He further found (R. 121) that "It is inaccurate to say the the 'Conditions' were 'imposed' upon employers if by that is meant that employers were forced to submit to a posting of the 'Conditions' form and the acceptance of terms unilaterally promulgated by the Union. The record shows that the Locals were prepared to, and did, negotiate with respect to wages, eco-

nomic conditions and certain other provisions in the forms; that the use of a posted form was not always insisted upon, and that the 'Conditions' form as a rule was not posted until after agreement was reached on all issues and often not even then."

7. Because of questions raised as to the legality of this so-called "no contract policy," the ITU on October 7, 1947, announced a new program under which employers who insisted on a contract in place of operating under the "Conditions" were to be offered a Form P-6A contract, prepared by the ITU. The P-6A sample contract provided that it was to continue in force and effect "unless and until terminated by either party by written notice of sixty days" (R. 2058).

8. The subordinate locals were advised not to change in any way the 60-day cancellation clause or several other clauses, which other clauses were not involved in those aspects of the decision below as to which petitioners seek review. At the time of its promulgation, the 60-day cancellation clause was explained by the ITU as essential because "It puts the employer in the position where he is likely not to have union employees working for him if he hires non-union men; if he brings non-union matter for you to work on, or if he tries to take away your jurisdiction. The reason we adopted a 'no contract' policy was to protect ourselves against the above acts which the employer could perform to our destruction. NOW—with the 60-day notice requirement of the T-H-L, a local union can terminate form P-6A on 60 days' notice and begin 'bargaining in good faith,' again, even 'Denham style,' and be free at the end of the 60 days. . . . It may be after the employer 'bargains in good faith' with us he will take another look at our 'Conditions of Employment' idea which was successful and acceptable enough until the T-H-L and Denham" (R. 2075).

Additionally, there is undisputed evidence of other reasons for the adoption of the 60-day cancellation clause.[1]

9. The Trial Examiner noted (R. 122) that "It is contended that certain specific clauses of P-6A, considered separately and in certain combinations, constitute that form a legally binding agreement to maintain a closed shop. I do not agree. It is clear from the record as a whole that P-6A was not designed as a legally enforceable closed shop contract, was not represented as such, and was not so understood." Moreover, it was not found that it is unlawful for parties to propose a contract of indefinite duration, with a provision that it may be cancellable on 60 days' notice. Neither the Board nor the Court of Appeals differed with the Trial Examiner in these respects.

10. All of the foregoing policies of the ITU were found by the Board (R. 284) to be component parts of a program of "applying coercive pressures on employers in the newspaper industry in order to compel them to conduct labor relations pursuant to a 'bargaining' scheme designed primarily to effect the maintenance of 'closed-shop' conditions." The Board also described it (R. 286) as a strategy of compelling "the non-contractual employer maintenance of 'closed shop' conditions by the use of a continuing threat to strike," a threat thought to be implicit in the "no-contract policy" and in the 60-day cancellation clause of Form P-6A.

11. On July 21, 1947, Local No. 16 gave notice that the current Chicago contract, an admittedly lawful one, would expire in three months and requested negotiations as required by that contract. The local offered a one year extension of the contract, coupled with Form A, as advised at that time by the ITU. Form A contained a 60-day cancellation clause. The Chicago publishers rejected this proposal because they felt that the 60-day cancellation clause

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[1] The rising cost of living and the possibility that the employer might use unlawful means to destroy a local union were among the legitimate reasons prompting ITU locals to propose the 60-day cancellation clause. See R. 2580.

gave them no stability in their relationships with the union. They suggested a straight one-year extension. Both sides, in suggesting contracts, agreed that wage scales would be negotiated later. At the August 21 meeting Local No. 16 expressed its desire to sign no contracts and to work only according to "Conditions of Employment." The publishers thereafter refused to discuss wages at all so as not to reveal acceptable wage scales which the local could incorporate in its "Conditions."

12. On October 21, 1947, the existing Chicago contract expired. Local No. 16 offered Form P-6A, which was rejected. The local then informed the ITU President that a disagreement existed and requested him to appear on the scene to investigate the cause of the disagreement and to endeavor to adjust the difficulty, all in accordance with procedures established by ITU law. During the subsequent discussions with the Chicago publishers the President followed the then-existing ITU policies. At one meeting he was quoted as saying that "we will not work with non-union men, we will not handle the non-union product, we will keep our jurisdiction" (R. 533). The Trial Examiner found that the "publishers refused to discuss money," after the local had taken under advisement a "framework" proposed by the publishers (R.87). The local "remained adamant on that point (the right to discuss wages), and the publishers were equally tenacious in maintaining their position" (that they would not). The Trial Examiner then found (R. 87) that "By mutual agreement the negotiations were declared deadlocked" and a strike ensued on November 24, 1947.

13. There was no evidence and hence no findings that the Chicago publishers ever addressed a request to bargain to the ITU. The ITU never held itself out as a bargaining agent and was never considered to be such by anyone. The General Laws of the ITU provided (R. 1699) that the local union rather than the ITU was to be the contracting party

in agreements with publishers and that it was the obligation of the local union to observe and enforce the terms of the contract.

14. The Trial Examiner found (R. 116) that up to March 1948, 682 wage scales within ITU policy had been put into effect. Of that number, 271 involved "Conditions of Employment," while 18 involved P-6A agreements. No contract was approved during that period which did not involve a 60-day cancellation clause. But no order was recommended by the Trial Examiner or entered by the Board or Court setting aside these arrangements. There was no evidence and there was no finding that the reserved right to strike was in any instance exercised in these cases, or that the right of cancellation under Form P-6A was employed, or that local unions did not fully live up to their obligations in those cases where such arrangements were made. The Court of Appeals merely commented (R. 3074, 193 F.2d at 795-6) that "These figures show that the ITU's desire for work at increased wages, without giving up its traditional policies and practices, was granted by the publishers in most cases and that the offer of the P-6A contract served its purpose of driving the publishers to accept what seemed the lesser evil, the Conditions of Employment and voluntary increases without any contract."

15. The ITU, directly and through its subordinate locals, was found to be insisting and demanding that the employers hire only union foremen. But there was no finding that the ITU or its locals used any restraint or coercion addressed specifically to this foreman demand. The Trial Examiner found (R. 127) that no publisher "specifically resisted, or even objected to, the ITU requirement that only Union foremen be hired, while publishers at certain cities, such as Chicago and New York, affirmatively declared their intent to continue hiring only Union foremen." He also found (R. 135) that "a contractual undertaking that foremen be members of a union is not contrary to law unless

the employer is restrained or coerced into agreeing to it." The restraint and coercion were found to exist solely by virtue of the fact that the foremen demand was a part of the general ITU collective bargaining scheme, which was said to involve strike threats. The Court of Appeals remarked (R. 3094, 193 F.2d at 805) that "The general scheme was secured by threats of strike, by restraint and coercion," and that the ITU "apparently thought that union foremen were important to their general scheme for maintaining closed shop conditions."

On the basis of the foregoing facts the Trial Examiner and the Board in the ANPA proceeding found that the ITU and its officers had violated Sections 8(b)(2) and 8(b)(1)(B), and in the Chicago proceeding they found additionally that Local No. 16 and the ITU had jointly violated Section 8(b)(3).[3] The Section 8(b)(2) violation was said to consist of the formation and execution of the ITU collective bargaining policy so as to perpetuate closed shop conditions—thereby causing and attempting to cause employers to discriminate in violation of Section 8(a)(3). The Section 8(b)(1)(B) violation was found to exist in the fact that the request for union foremen was part of this ITU bargaining policy, it being immaterial that no restraint or coercion was directed specifically to the foreman issue. The Section 8(b)(3) violation in the Chicago proceeding was said to follow from the use of the "no contract policy" and the offering of Form P-6A during the course of collective bargaining. The ITU was held to be a joint bargaining agent because of its

[3] During the pendency of the ANPA proceeding, the General Counsel of the Board applied to the United States District Court for the Southern District of Indiana for a temporary injunction against the ITU and its officers pursuant to Section 10(j) of the Act. The injunction was issued on March 27, 1948, enjoining the ITU and its officers from engaging in activities which the complaint in the ANPA case alleged were unfair labor practices. *Evans* v. *ITU*, 76 F. Supp. 881 (S.D. Ind.). A finding of civil contempt of the injunction decree was made on October 14, 1948, involving facts outside the scope of the instant petitions for writs of certiorari. *Evans* v. *ITU*, 81 F. Supp. 675 (S.D. Ind.).

control over Local No. 16 and the participation of the ITU President in the negotiations, despite the fact that the employees involved never designated the ITU as a bargaining agent and no request to bargain was ever addressed to the ITU. On this point, Members Houston and Murdock dissented, holding that there was no warrant in policy or law for finding that the ITU had violated Section 8(b)(3). The Court of Appeals affirmed the Board in all these respects.

Almost simultaneously with the filing of the Board's petitions to enforce its orders in the ANPA and Chicago proceedings, the ANPA filed with the Court of Appeals a petition to review those aspects of the Board's decision in the ANPA proceeding which were favorable to the ITU and adverse to the ANPA. The ITU was admitted as an intervener in this review.[3] The Court of Appeals dismissed all of the ANPA's objections save the one that claimed that the Board erred in failing to make findings as to a violation of Section 8(b)(3) by the ITU in the ANPA proceeding.

At no time throughout the protracted ANPA hearings, exceptions, arguments and briefs before the Board did the ANPA urge the propriety of finding a violation of Section 8(b)(3).[4] At no time did it proffer any evidence of what constituted an appropriate unit or of a request upon the ITU by any publisher to engage in collective bargaining. But before the Court of Appeals the ANPA for the first time argued that the record required a finding that Section 8(b)(3) had been violated. That court held that "The failure to specify in the complaint the correct subsection of the Act did not require the Board to dismiss this charge without a consideration as to the sufficiency of the proof." (R. 3082, 193 F.2d at 799-800).

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[3] See *ANPA* v. *Labor Board*, 190 F.2d 45, 49 (C.A. 7).
[4] See R. 43-48, 51-52, 180-193.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the ITU and its officers violated Section 8(b)(2) in the absence of a showing that specific, identifiable employees or applicants were the actual objects of a discriminatory scheme.

2. In holding that the ITU and its officers violated Section 8(b)(2) merely because subordinate locals sought to obtain lawful conditions which created the possibility of discrimination by an employer at some indefinite future time.

3. In holding that the ITU can be a joint statutory bargaining representative with one of its locals where it has not been selected as such by the employees involved and where it is an entity separate and distinct from its various locals.

4. In holding that the ITU violated Section 8(b)(3) where it had never received any request to bargain with the employers.

5. In holding that the ITU and its Chicago local violated Section 8(b)(3) because the local advanced a proposal lawful on its face but which, if accepted, might in the future be found to have been used in an illegal manner.

6. In holding that Section 8(b)(1)(B) was violated by the ITU and its officers merely because subordinate locals made lawful demands for union foremen without any restraint or coercion being specifically directed toward such demands.

7. In remanding to the Board a portion of the review proceeding to determine whether Section 8(b)(3) had been violated where that issue had not previously been argued before the Board and where no evidence had been proffered in terms of Section 8(b)(3).

REASONS FOR GRANTING THE WRITS

1. The decision of the Court of Appeals interpreting and applying Section 8(b)(2) presents important questions in the administration of this section of the Act which have not been previously determined by this Court. The importance of these questions goes far beyond the interests of the petitioners. They vitally affect the interests of every union whose actions are subject to the scrutiny of the Act. Settlement of these questions at this time by the Court is plainly in the public interest, for such matters arise daily in the functioning of most unions. Until authoritative rulings are made which definitely settle the issues, unions are forced to remain in doubt as to the legality under Section 8(b)(2) of various courses of action which have traditionally been utilized by them.

There are two facets to the Section 8(b)(2) problem. That section quite plainly reads that it is an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against *an employee* in violation of subsection (a)(3)." (Emphasis added.)

The first question is whether Section 8(b)(2) can ever come into operation except where there is a discriminatory scheme directed to *an employee*—an identifiable person—whether in the status of an applicant or an employed worker. The Board and the Court of Appeals have taken the position that the whole world of unidentifiable workers and potential applicants is comprehended within this provision. But petitioners maintain that the clear statutory language and the legislative history require that the term "an employee" be read in terms of specificity and identifiability. This issue is presented squarely in this case, for there is no claim and certainly no evidence that the ITU's actions or policies contemplated employer discrimination against specific, identifiable persons. Indeed, there is no suggestion in the record that any particular person ever

made application for a job only to be turned down because he was not an ITU member.[5]

In support of their position, petitioners point to the studied use of the singular form of the term "an employee," which suggests an identifiable person. And the very concept of discrimination, emphasizing as it does the making of discriminations in particular cases,[6] buttresses such a use of the term "an employee."

Moreover, the discrimination with which Section 8(b)(2) is concerned is the discrimination that marks a violation of Section 8(a)(3) by an employer. There is not a single recorded instance, under either the Wagner Act or the Taft-Hartley Act, where a violation of Section 8(a)(3) was found in the absence of specific, identifiable employees or applicants as the objects of the discriminatory action by the employer. The two sections must be interpreted in a consistent manner. Otherwise Section 8(b)(2), if applied to discriminations against the whole world of workers, makes it illegal to attempt to bring about what is perfectly legal under Section 8(a)(3).

The legislative history is indisputable in this respect. In reporting on Section 8(b)(2) of S. 1126, which in its reference to discrimination against "an employee" is identical with the provision which is now law, the Senate Report (S.Rep.No.105, 80th Cong., 1st Sess., p. 21) made it plain that Section 8(b)(2) "is designed to protect *individual employees* from discrimination in employment induced by a labor organization which has a union-shop contract with an employer." No other report or statement

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[5] As the Trial Examiner noted (R. 117), "No evidence was adduced to show specifically that any non-union man was discriminated against in employment by any newspaper publisher since August 22, 1947."

[6] The verb "discriminate" is defined by competent authority (New Century Dictionary) to mean "to make a distinction, as in favor of or against a person or thing." The same authority defines the noun "discrimination" to mean "the act of discriminating or differentiating, or the resulting state; the making of a difference *in particular cases*, as in favor of or against a person or thing." (Emphasis added).

in Congress contravened that interpretation of the term "an employee."

It is true that this issue was presented among others raised in two cases in which certiorari was denied by this Court. *Labor Board* v. *National Maritime Union,* 175 F.2d 686 (C.A. 2), cert. denied, 334 U.S. 854; *International Union, United Mine Workers* v. *Labor Board,* 184 F.2d 392 (C.A.D.C.), cert. denied, 340 U.S. 934. But apart from the fact that the denial of certiorari by this Court does not imply any determination as to the importance or merits of the issue, these cases only serve to augment the importance of the matter and the frequency with which it arises. To date the Board and the lower courts have refused to analyze the problem and to settle the important questions which are at stake. They have done no more than the Court of Appeals for the Second Circuit did in the *National Maritime Union case,* 175 F.2d at 689, when it said flatly that "we see no rational basis for respondent's argument." The Court of Appeals in the instant case contented itself with repeating this summary, nonanalytical rejection of the argument. (R. 3089, 193 F.2d at 803.) The time is ripe, therefore, for this Court to make a definitive determination as to the meaning and applicability of Section 8(b)(2) to the recurring type of facts involved in this case.

The second question arising under Section 8(b)(2) which deserves the attention of this Court is whether it can be applicable to a situation where a union makes a lawful proposal during collective bargaining which creates the possibility of discrimination by an employer at some indefinite future time. Placing the most damaging connotation on the evidence in the record reveals nothing more than an effort by the ITU and its locals, bent on maintaining closed shop conditions, to reach certain agreements with the publishers, agreements which on their face did

not require discrimination but under which discrimination conceivably could occur in the indeterminate future.[1] These agreements were admittedly capable of being executed in a legal, non-discriminatory manner; in fact, the absence of even a suggestion of actual discrimination where the agreements were in force demonstrates the lawful capacities of these proposals.

In this context, the question thus is whether the ITU or any other union advancing a proposal which can be executed in a discriminatory or non-discriminatory manner has violated Section 8(b)(2) in the sense of having "attempted" to cause employers to engage in illegal discrimination. Petitioners maintain that an "attempt," as all relevant authority makes plain, connotes something more than an evil state of mind, an intention to commit a legal wrong or the creation or maintenance of an atmosphere wherein an intended illegal act can still conceivably take place in the indefinite future. There must be some imminent likelihood of the proscribed evil being perpetrated, some overt act which comes near to accomplishing the outlawed result. *Commonwealth* v. *Kennedy*, 170 Mass. 18; *State* v. *Ainsworth*, 146 Kans. 665. It is not enough that the stage merely be set for the illegal act, if it is still possible that the law will be obeyed.

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[1] There was no finding that the Form P-6A proposal contained provisions which necessarily, and on their face, required the employers accepting them to engage in illegal discrimination. As the Trial Examiner admitted (R. 121), "Under the ITU program, an employer was not asked to agree not to hire non-union men." The possibility of discrimination was thought to lurk in the 60-day cancellation clause, coupled with a threat to strike at the end of 60 days if non-union men were hired. The publisher was said to understand that ways had to be found to effectuate discrimination in the future if the need arose; the particular method was said to be left "to the publishers' own ingenuity." (R. 121). But the 60-day clause conceivably could be used in support of lawful economic objects (R. 2580). And, in point of fact, it was never used for the unlawful purpose of securing discrimination in hire or fire. The entire substance of the Section 8(b)(2) illegality, as found by the Board and the court below, thus rests upon an unlawful possibility which never in fact materialized.

The contrary position of the Board and the Court of Appeals, if carried to its logical conclusion, would mean that the execution of every collective bargaining agreement, or even the proposal of one, constitutes an attempt on the part of the union to cause the employer to discriminate if it is conceivably possible under that contract for discrimination to occur at some time in the future. Indeed, the mere formation of a union by persons who have announced their opposition to working with non-union men can be said to be an attempt to cause discrimination, since the union conceivably could call a strike some day to force an employer to discharge a non-union worker.

The absurdity of such results only serves to underscore the fallacy of the approach of the Board and the Court of Appeals in this case. And it serves to emphasize the importance of the issue thus raised, for unless this Court sets the matter aright all unions will be forced to bargain under the constant threat that their proposals will render them guilty of an unfair labor practice if some possible discrimination can be read into the provisions thereof.

2. The decision below in affirming the Board's determination that the ITU, jointly with Local No. 16, was the statutory bargaining representative of ITU members in Chicago and hence violated Section 8(b)(3) raises a highly significant issue meriting review by this Court. This determination goes far beyond the immediate parties; it strikes at the very vitals of every national and international labor organization; it flouts the principle of free employee choice which is supposed to characterize the designation of bargaining agents; and it produces violations of Section 8(b)(3) which were never contemplated by Congress. Un-

der these circumstances, the intervention of this Court is necessary to restore the intended statutory scheme.

Section 9(a) of the Act requires only that the exclusive representatives of employees be "designated or selected" by a majority of the employees in the appropriate unit. It does not prescribe or limit the manner in which such designation or selection is to be made. But Section 7 underlines the statutory intent that the representatives be "of their (the employees') own choosing." Generally, employees subject to ITU jurisdiction have not followed the practice of designating their representatives by resort to Board-conducted elections. But the record makes clear that those employees in Chicago unequivocally chose only their local union as their bargaining representative, a choice that the Board nullified by erroneous reliance on irrelevant factors.

The Board found that the employees had chosen the ITU as a joint bargaining representative solely upon the Board's "analysis of the terms of the intra-union membership arrangement relating to the scope of the International's authority." (R. 344, 86 N.L.R.B. at 1045). Obviously, an objective analysis by the Board (or by any agency or persons other than the employees themselves) of internal union documents, even assuming its reasonableness or accuracy, cannot countervail—much less substitute for—the explicit choice of the affected employees. The touchstone of the statute is the unfettered right of workers freely to choose their own bargaining representatives. "Freedom to choose, in this statutory setting, must mean complete freedom to choose any qualified representative unless limited by a valid contrary policy adopted by the Board." *Labor Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416, 425. The statute is grotesquely distorted where, as here, the government imposes such a representative on employees, regardless of whether that imposition is ef-

fected by arbitrary mandate or, more subtly, by elaborate interpretation.[8]

The Board substituted its own interpretation of the ITU's internal laws and arrangements for uncontradicted evidence in the record which established that:

a. In the few pre-Taft-Hartley instances where bargaining representatives have been certified in the printing industry, ITU locals alone have been certified—including Local No. 16 in Chicago. Never has the ITU itself been certified, either alone or jointly. See *Matter of LaSalle-Crittenden Press, Inc.*, Case No. 13-R-3784, and *Matter of Excello Press, Inc.*, Case No. 13-R-3934, where the Board certified the Chicago local as the exclusive bargaining representative of the employees involved in the Chicago proceeding. See also *Matter of Register Publishing Co.*, 44 N.L.R.B 834, enfd. as mod., 141 F.2d 156 (C.A. 9), where the Board certified the Santa Ana, California, Local of the ITU as the exclusive bargaining agent. All of these cases were noted in the dissenting opinion of Board Members Houston and Murdock. (R. 355, 86 N.L.R.B. at 1053, footnote 23.)

b. The Chicago employees and all other members of the ITU have always recognized subordinate locals as their exclusive bargaining agents, with sole authority to enter into binding agreements or to take strike action. (R. 1699).

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[8] "Labor has its own usages, customs and practices. Other persons are not always familiar with them. Unions are no longer in the amorphous stage in which they have no traditions or mores for doing things. They now have a vocabulary or language of their own, in some instances as unintelligible to outsiders as Gaelic to a Greek. The customs, practices, agreements and understanding relating to unions, membership in them, the methods of acquiring membership, the various stages and degrees of affiliation, the powers of officers to act for unions, for members, and for others, *the scope of the union's powers and authority*, all these things are matters peculiarly within the knowledge of workingmen." Justice Rutledge, speaking for the Court of Appeals in *Lebanon Steel Foundry Co.* v. *Labor Board*, 130 F.2d 404, 407-8 (C.A.D.C.), emphasis added.

c. The employers have had the same understanding at all times.*

d. There is not a single instance where the members of any local have by any action, formal or otherwise, objected to this prevailing understanding and practice.

e. There is not a single instance where any employer has called upon the ITU to engage in collective bargaining as a joint bargaining agent. (R. 2580, 2679-80).

f. The ITU has never held itself out in any way as a bargaining agent. (R. 1699).

g. All the contracts with employers have been made solely by local unions, the ITU never being a party to any of them. (R. 1699).

Thus, by an extended and consistent course of unambiguous conduct, the Chicago employees made clear their exclusive choice of Local No. 16 as their bargaining representative. It is doubtful, in the face of that record, whether any inquiry into the internal laws of the ITU is necessary. But to the extent that such inquiry may be necessary to shed further light on the employees' choice, then clearly only the employees' interpretation of those laws is relevant. Even if their interpretation be unreasonable it is, of course, more reflective of their choice of a bargaining representa-

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* One of the publishers' representatives, John F. O'Keefe, testified that when the ITU officers appeared at the Chicago negotiations pursuant to ITU law, the ITU President made it clear at the outset that neither he nor the other officers were present "as a bargaining agent for the ITU or for the local. He said that he was there as president in an attempt to adjust the deadlock . . . He said he was here only to adjust differences. Whatever he might say has to do with his own opinions, opinions for whatever use they might be to the local bargaining agent. 'What I say here,' he said, 'is only in an effort to help.'" (R. 541).

tive than can be any contrary interpretation by the Board.[10]

The complete lack of any "warrant in policy or law" for finding the ITU to be a joint bargaining representative in these circumstances has been demonstrated by the dissenting opinion filed by Board Members Houston and Murdock. (R. 354-7, 86 N.L.R.B. at 1052-5). In addition to the considerations pointed out in that dissent, various evil consequences will flow from the result reached by the Board and affirmed by the Court of Appeals. Among them are the following:

a. It would allow ITU officials to intervene in any local negotiations anywhere and at any time, despite contrary directions by union members, and to compromise away the basic laws of the organization, adopted by the membership, if they were so minded. To this extent it strikes directly at orderly and democratic trade union procedures.

b. It would allow employers to harass the ITU by reiterated demands that it fulfill its obligations to bargain collectively. It is practically impossible for the ITU to provide the staff to participate in all the 1200 to 1500 local negotiations merely because some or all employers may think that desirable. See R. 2564.

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[10] That there was no unreasonable interpretation by the employees is shown by the explicit provision of Article III, Section 1, of the ITU's General Laws (R. 1699), adopted by the entire membership, that "Contracts between local unions and employers are collective agreements *in which the local union as such* is a contracting party with an employer. . . . *It is the obligation of the local union* to observe and enforce terms of the contract." (Emphasis added.) See also other provisions of the General Laws bearing out the same interpretation. (R. 1699-1703, Secs. 2, 3, 4, 7, 10, 11, 13, 14, 15, 16, 20, 21, 22 and 23 of Article III).

Further confirmation of the reasonableness of the union's interpretation of its own laws in this respect is to be found in the report of Trial Examiner Ringer in *Matter of ITU and Baltimore Typographical Union No. 12*, 87 N.L.R.B. 1215 at 1246. After examining the same laws and provisions as did the Trial Examiner and the Board in the Chicago proceeding, he concluded: "Article III of the General Laws of the ITU makes it clear that the Local is the bargaining representative, conducts the negotiations, and is the contracting party on the union side. . . . the past bargaining by the Local, the General Laws of the ITU, and the membership in the Local, lead to the conclusion that the ITU was not selected as, and did not act as bargaining representative. It is so found."

c. It would subvert the free right of employees to choose representatives of their own choosing, and impose upon them bargaining arrangements which they, through their past decisions and conduct, have rejected.

d. It would allow employers to insist that local and international unions are the agents of each other for the purpose of service of process, liability for torts or breaches of contract, unfair labor practices, and the like, contrary to well-settled common law and NLRB principles which have recognized the separate legal personalities of the two.[11]

These various considerations emphasize the importance of the result reached below and the necessity that the reviewing and corrective power of this Court be invoked.

3. Closely allied with the foregoing point is an additional issue which deserves review by this Court because of the importance which attaches to it. One of the inevitable consequences of holding the ITU to be a joint bargaining agent under circumstances where the employees and the employers have never considered it to be such an agent is that the ITU becomes responsible under Section 8(b)(3) for failures to bargain in good faith in situations where no request to bargain has ever been addressed to it by an employer. Such has happened in this case. No Chicago publisher ever asked the ITU to engage in collective bargaining. Yet the ITU had been held to have

[11] It is unnecessary to cite the voluminous line of cases in which courts have recognized the separate legal status of international and local unions. See, e.g., *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344. In *Daily Review Corp.* v. *ITU*, 9 F. R. D. 295, 24 LRRM 2179 (E.D.N.Y.), a federal district court recognized the clear demarcation between the entity of the ITU as an international union and the entity of one of its subordinate local unions.

violated Section 8(b)(3) along with Local No. 16, to which requests were actually made.

It is axiomatic that a request to bargain is a necessary prerequisite to any finding of a failure to bargain in good faith. *Labor Board* v. *Columbian Enameling Co.*, 306 U.S. 292, 297-8; *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344. No such request having been made to the ITU in this case, it was plain error to hold that the ITU was guilty of a refusal to bargain in good faith in violation of Section 8(b)(3).

4. The decision below that the ITU and Local No. 16 violated Section 8(b)(3) insofar as the local advanced Form P-6A, a proposal lawful on its face and capable of lawful application, raises important questions as to the nature of collective bargaining which have not previously been determined by this Court. That decision is based upon an assumption that completely rejects the concept of free collective bargaining and frustrates the statutory scheme contemplated by Congress. It is a decision that warrants immediate review and reversal by this Court in the interests of fair administration of Section 8(b)(3).

The offering of Form P-6A contract as a basis for negotiations with the Chicago publishers was found indicative of bad faith bargaining only because of the Board's belief that one of the provisions thereof—the 60-day cancellation clause—was a means for achieving illegal discrimination. It is to be noted that this was not a proposal for a 60-day contract. It was a proposal for an agreement of unlimited duration, cancellable upon sixty days' notice by either party.[13] Such contracts of unlimited duration have been

[13] This crucial provision stated that "This agreement shall be effective from the date set forth below and shall continue in effect unless and until terminated by either party by written notice of sixty days." (R. 2058).

a traditional well-established form of trade agreement. And it has universally been recognized that the duty to bargain in good faith does not require that the parties agree to a contract for an extended period of time, that "the duration of the agreement, like any of its substantive terms, is a matter for negotiation between the parties." *Matter of St. Joseph's Stockyards,* 2 N.L.R.B. 39.

It is undenied that nothing on the face of this 60-day cancellation clause or any other clause of Form P-6A called for the maintenance of closed shop conditions or for illegal discrimination. Lack of good faith bargaining was found only because the Board, in the light of the traditional one-year contracts in the printing industry, was unable to discern any economic justification for the union's request for the 60-day cancellation clause.[13] The Board therefore assumed that the local must have had an illegal purpose in mind and meant to effectuate that purpose by utilizing the 60-day cancellation clause whenever necessary. Hence it was not bargaining in good faith in proposing such a clause.

To apply such reasoning and assumptions to the collective bargaining concept is to torture it beyond all recognition. To inject into the inquiry an investigation of the motives behind the lawful proposals of the contracting parties is to make collective bargaining a grave risk rather than an opportunity for free and unrestricted discussion. The Board's reasoning, by seeking to assess the underlying thoughts of the ITU leadership, makes it an unfair labor practice for an ITU local to propose anything that might be used in such a way as to coincide with what the Board thinks are the ITU illegal motives. It matters not that the proposal might in fact be used for lawful purposes and is actually so used. The risk—the unfair labor practice—occurs at the moment the proposal is placed on the bargaining table. Unless the party is then certain that

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[13] See footnote 1, *supra.*

the Board will not ascribe illegal motives to the authors of the proposal and that, if adopted, the proposal will never be used to effectuate such motives, the only safe thing to do is to refrain from making the proposal. Collective bargaining thus defined begins to approximate governmental dictation of contract terms.

Because the decision below does result in an unwarranted extension of control of contract proposals and terms,[14] the reviewing power of this Court is urgently needed to prevent this perversion of one of the most basic principles of the Act—free collective bargaining.

5. The decision below that the ITU and its locals "restrained and coerced" the employers in the selection of their representatives for the purposes of the adjustment of grievances, thereby violating Section 8(b)(1)(B) of the Act (R. 293), also presents an important issue in the administration of that section of the Act which has not previously been determined by this Court.

The Court of Appeals adopted the reasoning of the Board and the Trial Examiner that the ITU bargaining demand that composing room foremen be union members was an inseparable part of the ITU bargaining policy—a policy which was held to be aimed at maintaining closed-shop conditions and to be inherently coercive in character. A threat of strike was said to underlay all of this policy. Hence it was reasoned that restraint and coercion were used in support of the foreman demand in violation of Section 8(b)(1)(B).

But the undisputed evidence shows that the foreman demand was a lawful one, foremen no longer being employees

[14] See Cox, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389.

under the Act,[15] and that no strike threat was ever directed toward that demand. Indeed, no occasion ever arose for the use of such a threat. The record clearly showed (R. 127, 292) that no publisher even objected to this request and that some publishers affirmatively declared their intent to continue hiring only union foremen. How, then, can it realistically be said that any restraint or coercion was directed toward a demand which was not resisted by any employer and which was affirmatively desired by some?

It is no answer to say, as the Board did, that the restraint and coercion need not be effective. The question still remains whether there can be any restraint or coercion in the first place under the circumstances of this case. The fact that a strike threat was found to underlay the policy of which this demand was a part does not supply that restraint and coercion. Strikes and threat of strike, realistically speaking, are addressed only to those demands which the employer resists and which the union considers so essential to its well being that it is willing to risk all that a strike entails. To say that a strike threat applies indiscriminately to all parts of a bargaining policy—the licit and the illicit—is indeed an ugly manifestation of the guilt by association technique. A perfectly lawful demand which needs no supporting strike threat does not become unlawful merely because it may be associated with other demands which are backed by strike threats. The decision below to the contrary vitiates sound reason and results in an unfair and unintended application of Section 8(b)(1)(B).

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[15] The Trial Examiner pointed out (R. 126) that "it is not illegal under Section 8(b)(1)(B) for a union to press a demand, or for an employer to agree, that foremen shall be members of the union." Moreover, the conference report on the bill which became the Taft-Hartley Act (H. Conf. Rep. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 60) stated that "There was nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization. . . . The conference agreement adopts the provisions of the Senate amendment." And see 93 Cong. Rec. 3952.

6. Petitioners, as interveners in the ANPA review proceeding,[16] seek this Court's review of that portion of the Court of Appeals decision which remanded the case to the Board to determine whether there was proof that the ITU violated Section 8(b)(3) apart from its connection with the Chicago negotiations. The court stated that the complaint filed by the ANPA before the Board alleged that the ITU had restrained or coerced employees in the exercise of their rights guaranteed by Section 7 by refusing and causing its subordinate locals to refuse to bargain collectively in good faith; the allegation was that the ITU thereby violated Section 8(b)(1)(A) of the Act. No allegation was made that the ITU thereby violated Section 8(b)(3). The court below held that the failure to specify Section 8(b)(3) was immaterial and that the Board erred in failing to render a determination as to whether Section 8(b)(3) had been violated by the ITU.

Such a remand is a gross abuse of the reviewing powers of the Court of Appeals. No allegation was ever made that the ITU had refused to bargain collectively; the charge merely was that the ITU caused its locals to refuse to bargain. More important, no evidence was ever adduced to show what was the appropriate unit represented by the ITU. No evidence was introduced to show that any demand to bargain was made on the ITU by any publisher—a neces-

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[16] The ITU was originally named as a party to the ANPA's petition to review that portion of the Board's order which was unfavorable to the ANPA position. But on motion of the Board, the Court of Appeals struck the ITU and its agents as parties. It then granted the motion of the ITU to intervene. *ANPA* v. *Labor Board*, 190 F.2d 45, 49 (C.A. 7). It is well established, of course, that an intervening union has standing to seek a writ of certiorari from a decision below which is adverse to its interests, even where the Board has elected not to seek review. *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining Co.*, 325 U.S. 335, 338-9.

sary prerequisite to any finding of a violation of Section 8(b)(3). But most important of all was the failure of the ANPA to urge before the Board that an allegation of Section 8(b)(3) was at stake. In all the protracted hearings, in all the voluminous briefs and in all the long oral arguments before the Board, the ANPA uttered not one word to the effect that the ITU had violated Section 8(b)(3).

Section 10(e) of the Act plainly states that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Section 8(b)(3) objection not having been urged and there being no extraordinary circumstances to excuse such failure, Section 10(e) made it mandatory that the Court of Appeals refuse to consider the belatedly advanced argument by the ANPA respecting Section 8(b)(3). *Labor Board* v. *Newport News Co.*, 308 U.S. 241, 249-250; *Marshall Field & Co.* v. *Labor Board*, 318 U.S. 253; *Labor Board* v. *Cheney Lumber Co.*, 327 U.S 385; and see *Labor Board* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416, 427.

CONCLUSION

For the foregoing reasons, these petitions for writs of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 758

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v.

NATIONAL LABOR RELATIONS BOARD

CHICAGO TYPOGRAPHICAL UNION NO. 16, AND INTERNATIONAL TYPOGRAPHICAL UNION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL TYPOGRAPHICAL UNION, PETITIONER

v.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

These cases were dealt with in a single opinion by the court below (R. 3053–3096), reported at

193 F. 2d 782. The findings of fact, conclusions of law, and orders of the Board (R. 283–299 and 339–359) in the two cases before the Board from which these proceedings arose are reported at 86 N. L. R. B. 951 and 86 N. L. R. B. 1041, respectively.

JURISDICTION

The decrees of the court below were entered on February 11, 1952 (R. 3097, 3103, 3109). The petition for a writ of certiorari was filed on May 9, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 28–31.

QUESTIONS PRESENTED

The Board found that petitioners, for the avowed purpose of compelling employers to continue to operate closed shops, which had been declared illegal by the amended Act, adopted a collective bargaining policy under which they would be contractually free to strike, and announced that they would strike, if an employer hired a nonunion man. Pursuant to this policy, petitioners initially insisted that the employers operate noncontractually under conditions of employment unilaterally imposed by petitioners.

Later, as an alternative, petitioners offered to sign contracts terminable upon sixty days' notice, the admitted purpose of the termination provision being to permit petitioners to call a strike in the event an employer attempted to avoid operating under petitioners' closed shop policy. The questions presented are:

1. (a) Whether the Board could properly find that petitioners, in violation of Section 8 (b) (2) of the Act, caused or attempted to cause employers to discriminate on the basis of union membership, in the absence of a showing that the discrimination was intended to affect or had affected specific identifiable individuals.

(b) Whether the Board properly found that by insisting upon reserving contractual freedom to strike for the purpose of compelling the employers to maintain closed shop conditions, petitioners, in violation of Section 8 (b) (2), "attempted" to cause employers to discriminate.

2. Whether the Board could properly find that petitioners violated Section 8 (b) (3) of the Act by refusing to enter into any contract unless such contract was terminable upon sixty days' notice, where the purpose of the termination clause was to enable the Union, by threatening to terminate the contract and strike, to compel employers to maintain illegal closed shop conditions.

3. Whether substantial evidence on the record considered as a whole supports the Board's finding that the International Union as well as its local in the Chicago area had been designated by the employees involved as their collective bargaining representative.

4. Whether the Board could properly find that petitioners, having insisted as an integral part of their scheme for maintenance of closed shop conditions, that foremen who are empowered to adjust grievances must be union members, restrained or coerced employers in the selection of their representatives for the adjustment of grievances by threatening strike action to compel the employers to acquiesce in petitioners' entire scheme.

5. Whether the court below properly held that the Board was not precluded from finding that particular conduct constituted a refusal to bargain in violation of Section 8 (b) (3) of the Act where the complaint alleged and the parties litigated the refusal to bargain as a violation of Section 8 (b) (1) (A) of the Act.

STATEMENT

The questions which petitioners seek to have this Court review arise out of two cases, consolidated for purposes of hearing before the Board, which challenged the legality of the conduct of the International Typographical Union, hereafter called the ITU, and its constituent local

unions in adopting and applying their collective bargaining policies and practices subsequent to the enactment by Congress of the 1947 amendments to the Act. In one case, initiated by charges filed by the American Newspaper Publishers Association, herein called the ANPA,[1] the complaint alleged that the ITU and its officers had violated the Act through the application of their bargaining policies wherever the ITU and its locals negotiated with employers; in the other case, initiated by charges filed by the Chicago Newspaper Publishers Association, herein called CNPA,[2] the scope of the complaint was limited to the metropolitan area of Chicago, Illinois, and the Chicago local was joined with the ITU as a party respondent.

Following the usual proceedings under Section 10 of the Act, the Board on October 28, 1949, issued its decisions and orders, finding that the ITU, its officers, and the Chicago local had committed unfair labor practices (R. 283, 339). The Board petitioned the court below to enforce its

[1] The ANPA is a voluntary association of publishers of daily newspapers throughout the United States and Canada (R. 54–55; 374) created to promote the business interests of its members, to serve as a clearing house for exchange of information between members, and to function generally as a trade association (R. 1596–1597, 2941).

[2] The CNPA is an association of Chicago newspaper publishers which functions as the representative of its members in collective bargaining negotiations with labor unions, including ITU and its Chicago local (R. 313; 469–471).

orders in both cases and in one the ANPA petitioned for review of the Board's dismissal of portions of the complaint. These cases, together with another,[3] which presented issues identical with the ANPA's petition for review, but with which the present petition is not concerned, were heard together by the Court of Appeals, and were decided in a single opinion.

I. THE BOARD'S FINDING OF FACT

The Board found that the collective bargaining policy adopted by the ITU after the enactment of the amendments to the Act had for its purpose the maintenance of ITU's traditional closed shop conditions and that by pursuing this policy in their negotiations with the publishers, petitioners violated the statute in the following respects: In both the ANPA and Chicago cases, petitioners violated Section 8 (b) (2) of the Act by causing and attempting to cause the publishers to discriminate against employees and applicants for employment on the basis of their non-membership in the ITU; in the Chicago case, petitioners violated Section 8 (b) (3) of the Act by refusing to bargain in good faith with the publishers; and in the ANPA case, petitioners

[3] *Printing Industry of America* v. *National Labor Relations Board*, No. 10,356 on the docket of the court below. This case involved the same pattern of conduct by the ITU and its locals in the commercial printing industry, as did the ANPA case in the newspaper publishing industry.

violated Section 8 (b) (1) (B) of the Act by restraining and coercing the publishers in the selection of their representatives for the purposes of the adjustment of grievances. The Board further found that the petitioner ITU and its officers, in the ANPA case, did not violate Section 8 (b) (1) (A) of the Act by refusing to bargain or causing its locals to refuse to bargain with the publishers; it did not pass on whether the evidence established a refusal to bargain within the meaning of Section 8 (b) (3) since a violation of that Section of the Act was not alleged (R. 141, 283).

A. *Facts relied upon by the Board in finding violations of Section 8 (b) (2) and (3) of the Act.*—The Board based its conclusions with respect to the violations of Section 8 (b) (2) and (3) of the Act upon the following facts which are described in detail in the Board's decisions (R. 284–290, 341–347), in the trial examiner's intermediate reports (R. 55–118, 318–325), and in the opinion of the court below (R. 3056–3074), but which are only briefly summarized here:

The ITU has, generally speaking, operated on a closed shop basis since its inception 100 years ago (R. 61; 393, 422, 738–739, 1121, 2561, 2566–2567). Limitation of employment to union members traditionally has been accomplished through the insertion of the ITU General Laws, which require the closed shop, into collective bargaining

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contracts of a year or more duration (R. 60–61; 390, 391, 657, 737–738, 2680–2681).

Although it was apparent to the ITU that the 1947 amendments to the Act had outlawed the closed shop, the ITU steadfastly opposed any change in its traditional closed shop policy to conform with the requirements of the new legislation. As President Randolph wrote in the Typographical Journal[4] (R. 1799):

> The theory of the Taft-Hartley Law is that now an employer can "shoe horn" some non-union men into a union composing room and be protected against our men walking out. That is theory only. The condition is that our members will walk out.

At its annual convention on August 16 to 22, 1947, the ITU redefined its purpose to maintain its traditional trade union practices in the face of the amendments to the Act, and adopted a collective bargaining policy which contained the following explanatory provisions (R. 67–69; 2012–2014):

> It will be our policy to refrain from signing contracts in order that we avoid agreeing, or seeming to agree, or voluntarily accepting the conditions created by

[4] The Typographical Journal is the official organ of the ITU, is published monthly, and is distributed to all card-bearing members (R. 446, 449, 458, 1619).

> such a relationship under the Labor Management Relations Act of 1947.
>
> * * * * *
>
> Upon the expiration of existing contracts, and until the laws above referred to are amended and free collective bargaining is again recognized, our members may accept employment only from employers who are willing to employ them under "Conditions of Employment" which the several unions adopt, after approval by the Executive Council of the ITU.

In the view of the ITU this policy permitted economic retaliation by the union against employers who failed to maintain the ITU's traditional practices (R. 1877).

Soon after the convention, the ITU prepared and distributed Conditions of Employment forms to its local unions. These forms contained an introductory clause stating that the Conditions therein were "in nowise a contract," and detailed provisions which covered various aspects of the collective bargaining relationship that are normally the subject of negotiation and contract (R. 71; 1850). Blanks were inserted in the schedule of wages, hours and other economic terms for unilateral completion by the local unions. The locals to which these forms were distributed were directed to discuss economic terms of employment with employers, but to agree to nothing; the discussions were only to

serve as a guide to the unions as to what should be unilaterally included in the Conditions of Employment (R. 73; 2041, 2027, 2042, 2046, 2576–2577).

The local unions scrupulously followed the ITU policy (R. 1840–1841). Employer resistance to the conditions of employment device and an attack on its legality led to a modification of the ITU's strategy in September, 1947. A form contract, known as the P–6A Form, was distributed to the local unions with permission to submit it to employers. Like the Conditions of Employment form, P–6A contained a number of clauses dealing with economic terms of employment, but its most significant part was a preamble which gave either party the right to terminate the contract on 60 days notice (R. 2058). As stated in the bulletin from the ITU which explained the change in strategy to subordinate unions (R. 2075):

> The right to terminate on 60-day notice is absolutely essential because: It puts the employer in the position where he is likely not to have union employees working for him if he hires non-union men;

The change in strategy was designed only to satisfy the legal requirement that the union be willing to sign a contract; it marked no substantial departure from petitioners' primary objective, i. e., to require the employers to operate under Conditions of Employment and thereby to

immunize petitioners from contractual obligations (R. 286; 382, 2071–2075, 2575–2576, 2578). As the ITU explained to its local unions in a bulletin directing them on the use of form P–6A, the provisions of P–6A were designed to make "'Conditions of Employment' form much more desirable by employers" (R. 2057). Similarly, President Randolph frankly admitted to the CNPA during negotiations, "I do not recommend [P–6A]. Conditions of Employment are better for both parties" (R. 545). By March, 1948, the ITU had induced some 682 employers to operate pursuant to its policy; 271 had accepted the Conditions of Employment; only 18 had executed P–6A contracts, and most of the rest were instances where employers had voluntarily increased wages but where neither a contract nor Conditions of Employment obtained (R. 116; 2673–2674).

With minor deviations the ITU local unions followed the collective bargaining policy to the letter in their dealings with employers (R. 115; 1268–1269). Evidence was introduced into the record in these cases describing the course of collective bargaining negotiations with employers in twelve separate communities.[8] It will suffice here to describe briefly the negotiations in Chicago, which furnish, in part, the basis for the Board's

[8] The details with respect to these negotiations are set forth in the intermediate report (R. 79–118) and are not in dispute.

findings of violations of the Act by the ITU and its Chicago local, and which are illustrative of the manner in which the other negotiations proceeded.

From the outset the Chicago local insisted, in its negotiations with CNPA, that it did not wish to bargain for the purpose of making an agreement (R. 80; 479), but that it was primarily interested in preserving its traditional practices, as outlined in the General Laws of the ITU (R. 80; 481, 482). When the CNPA expressed concern over the problem created by non-union printers applying for jobs in the composing rooms, the union replied that it would not permit a non-union man to post his name on the priority board, and that there was no other way he could obtain work (R. 489–490).

At later meetings the Chicago local attempted to persuade the employers to acquiesce in the Conditions of Employment arrangement, and proposed to discuss wages, hours, and other economic conditions of work with the employers as a basis for decision by the local as to what terms it would unilaterally insert into the Conditions of Employment form (R. 81–82; 494–495, 503, 499). In a forthright explanation of the local's position with respect to the use of Conditions of Employment, the president of the local told the employers that they could not "tell us [the union] verbally or otherwise that a closed shop would be continued", but that "we must have a closed

shop, we are going to have a closed shop" (R. 503, 497–498, 811). Throughout these meetings, the employers insisted that the union's proposals were violative of the law and urged that a collective bargaining contract of reasonable duration be negotiated, as had been the custom for many years (R. 82–83; 481, 486–487, 491–492, 497–498, 502–503, 2126–2128).

On October 21, the expiration date of the existing contract, the Chicago local presented form P–6A to the employers as a contract that the union would be willing to sign (R. 83; 521, 608, 822, 834). When no agreement was reached on this proposal, the parties decided to request Randolph, President of the ITU, to intervene in the negotiations (R. 524–525). Randolph's participation, however, only served to solidify the respective positions of the parties. In hewing closely to the policy adopted at the ITU convention, as the Chicago local had previously done, Randolph told the employers that "we will not work with non-union men" (R. 84–85, 533), and further recommended that acceptance of the Conditions of Employment would be the least painful manner of maintaining these objectives (R. 84–85; 538, 542–544, 547, 555–558, 569, 639, 642, 1377).

On November 23, 1947, the Chicago local wrote the CNPA that it had adopted as one of its conditions of employment a wage scale of about $15 a week in excess of that being paid under the

former contract, and that unless paid, the union would strike on the following day (R. 87; 2178). When the employers rejected this unilaterally prescribed wage increase, the Chicago local, which had previously received authorization from the ITU (R. 736, 833, 1301), struck as it had threatened to do (R. 87; 582). The strike was in effect at the time of the hearing before the trial examiner (R. 634).

The Board found in both the ANPA and Chicago cases that ITU and the Chicago local had violated Section 8 (b) (2) of the Act in that they had insisted, in the application of their collective bargaining policy, that employers operate under one of two successive schemes, namely, Conditions of Employment and form P–6A, both of which would insure the continuation of closed-shop conditions; and that this insistance was backed by constant threat of strike (R. 284, 340). In the Chicago case, the Board found that both the ITU and the Chicago local had violated the good faith bargaining requirements of Section 2 (b) (3) of the Act, first, by refusing to sign any contract with employers and later, by agreeing alternatively to sign only contracts terminable upon sixty days notice, since the purpose of this limitation was to enable petitioners to enforce compliance with closed shop conditions by strike action (R. 341–342).

B. *Facts relied upon by the Board in the Chicago case in finding the ITU responsible jointly with the Chicago local for violating Section 8 (b) (3)'s bargaining requirements.*—The Board found that the employees involved in the Chicago case had designated the ITU as well as the Chicago local as their collective bargaining representative (R. 343–347). By joining the ITU the employees authorized bargaining on their behalf pursuant to the rules of that organization. The evidence shows that the general laws of the ITU authorize it to exercise substantial control over the substance of agreements which may be entered into by its locals. Thus, the ITU General Laws set forth various unalterable conditions of employment, both economic and pertaining to union security, which the ITU requires to be incorporated as nonbargainable provisions into every collective bargaining contract (R. 57–58; 802–803, 1217–1218, 1242–1247, 1354–1355, 1425). The laws likewise provide that none of these provisions shall be subject to arbitration (R. 58; 399–401, 1243, 1334–1337, 1356–1357, 1698, 2556). Local unions are authorized to enter negotiations only for the purpose of reaching tentative agreement on wage scales, hours and other conditions of peculiarly local application (R. 1699, 2556, 2559), and whatever proposals along these lines which locals wish to make must first be approved by the president of the ITU in order to assure

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that they are in complete uniformity with the laws and policies of the International body (R. 59, 346; 1218–1219, 1244, 1245, 1305, 1329, 1350, 1434). In addition, before a local may sign an agreement reached during negotiations, it must once more refer the proposal to the International president for final review and approval (R. 59; 1218–1219, 1244–1245, 1247, 1305, 2628–2630).

In the event of serious disagreement between a local union and an employer the local must notify the president of the ITU, who then directly intervenes in the negotiations and attempts to adjust the difficulty (R. 60; 736, 1239, 1296–1297, 1432–1433, 1674). This procedure was frequently invoked during the period of time involved in these cases (R. 639, 1011, 1299, 1301, 3007). In addition, the Executive Council of the ITU in the fall of 1947, negotiated with an ANPA committee in an attempt to settle bargaining differences on an industry-wide basis (R. 384–385; 1764–1767).

The control exercised by the ITU over the Chicago local in its negotiations with CNPA was on several occasions admitted by union officials (R. 80; 479, 483, 488, 492, 809–810). Such control was backed by the power of the ITU Executive Council summarily to expel any member of a subordinate union that failed to observe its interpretations and decisions concerning the col-

lective bargaining policy adopted in 1947 (R. 69; 1874, 2698–2699).

C. *Facts relied upon by the Board in finding a violation of Section 8 (b) (1) (B) of the Act.*—The ITU General Laws, which were required by the ITU and its locals to be incorporated by reference into the Conditions of Employment and the P–6A contracts, provide that all composing room foremen must be union members and that they shall represent the employers in the first instance in all grievance claims based on contract violations (R. 61, 291; 634, 839–840, 1262–1263, 1266, 1704, 1857, 2058). The Board found in the ANPA case that ITU's threat of strike action to compel the publishers to operate under Conditions of Employment or the form P–6A contract necessarily included a threat of strike action to compel the publishers to limit the selection of foremen who would represent management in the adjustment of grievances to union members (R. 290–293). This conduct, it concluded, was a violation by ITU of Section 8 (b) (1) (B) of the Act, which makes it unlawful for a union or its agents "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of * * * the adjustment of grievances" (R. 292–293).

D. *The Board's dismissal of the 8 (b) (1) (A) allegations of the complaint.*—The complaints in both the ANPA and Chicago cases alleged that

petitioners violated Section 8 (b) (1) (A) of the Act, *inter alia,* by failing to meet the good faith bargaining requirements of Section 8 (b) (3). The Board concluded, however, that even assuming that an infraction of Section 8 (b) (3) had occurred, petitioners' conduct in that respect was not the type of activity prohibited by Section 8 (b) (1) (A) (R. 287–290, 347). Because it had not been charged in the ANPA case that ITU had violated Section 8 (b) (3), the Board did not decide "whether the particular conduct complained of * * * sufficiently established a refusal to bargain," within the meaning of that Section (R. 141).

II. THE PROCEEDINGS IN THE COURT OF APPEALS

The court below upheld the Board's findings that the ITU and the Chicago local had violated Section 8 (b) (2) of the Act; that the ITU had violated Section 8 (b) (1) (B); and that in the Chicago case the ITU and the Chicago local had violated Section 8 (b) (3). In addition, while upholding the Board's conclusion that a refusal to bargain by the ITU could not constitute an infraction of Section 8 (b) (1) (A), the court held that the Board erred in not considering whether the evidence on that issue in the ANPA case established a violation of Section 8 (b) (3), although the complaint had not specifically alleged that Section 8 (b) (3) was violated. The court determined that the failure of the complaint

to specify the proper subsection of the Act does not prevent the Board from finding a violation of that subsection where the issue is fully litigated. It remanded the case to the Board "for consideration and decision upon the merits of the charge" that ITU and its agents had refused to bargain in good faith in the ANPA case (R. 3081–3083).

ARGUMENT

1. The decision below, sustaining the Board's finding that petitioners violated Section 8 (b) (2), is clearly correct and presents no substantial question warranting review by this Court. No conflict of decisions exists and none is claimed.

(a) The precise objection petitioners urge (Pet., pp. 16–17), namely, that no violation of Section 8 (b) (2) can be found in the absence of a showing that discrimination was directed against a specific identified individual, has been rejected by two other courts of appeals, in addition to the court below, and in each case this court denied certiorari. *National Labor Relations Board* v. *National Maritime Union,* 175 F. 2d 686, 689 (C. A. 2), certiorari denied, 338 U. S. 954, and *International Union, United Mine Workers* v. *National Labor Relations Board,* 184 F. 2d 392 (C. A. D. C.), certiorari denied, 340 U. S. 934. Described by the Court of Appeals for the Second Circuit in the *National Maritime Union* case as lacking "rational basis," that ob-

jection, for the reasons stated in our Brief in Opposition in that case, No. 488, October Term, 1949, pages 14–17, does not merit further review.*

(b) Equally lacking in substance is petitioner's claim (Pet., pp. 18–20), that their insistence upon the sixty-day termination clause did not violate Section 8 (b) (2) because such a clause "conceivably could be used" (Pet., note 7, p. 19), for a purpose other than to "cause or attempt to cause" employers to discriminate against employees on the basis of union membership. But

* Petitioners state (Pet., p. 17), "There is not a single recorded instance, under either the Wagner Act or the Taft-Hartley Act, where a violation of Section 8 (a) (3) was found in the absence of specific identifiable employees or applicants as the objects of the discriminatory action by the employers." However, both the courts and the Board have recognized that Section 8 (3) of the Wagner Act and Section 8 (a) (13) of the amended Act are violated by the mere execution of an illegal closed shop contract; consequently, a showing of discrimination against identifiable individuals is unnecessary to establish a violation of those sections. See, e. g., *Red Star Express Lines* v. *National Labor Relations Board* (C. A. 2), decided April 14, 1952, 29 L. R. R. M. 2705, 2707–2708; *Lee's Department Store* v. *National Labor Relations Board* (C. A. 9), decided April 21, 1952, 30 L. R. R. M. 2063, 2066; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660 (C. A. 9); *Donnelly Garment Co.* v. *National Labor Relations Board*, 165 F. 2d 940 (C. A. 8), enforcing 50 N. L. R. B. 241–246, 276; *Douds* v. *Anheuser-Busch, Inc.* (D. C. D. N. J.), decided June 13, 1951, 28 L. R. R. M. 2277; *I. A. M.* v. *Akmadzich* (D. C. S. D. Cal.), decided May 6, 1948, 22 L. R. R. M. 2095; *Waterfront Employers of Washington*, 98 N. L. R. B., No. 44; *Hager & Sons Hinge Mfg. Co.*, 80 N. L. R. B. 163; *Highway Trailer Co.*, 3 N. L. R. B. 591, 609–610.

the Board's finding, sustained by the court below, that petitioners insisted upon the clause for the precise purpose of effectuating their strike threats if employers departed from the closed shop policy, establishes that *in this case* petitioners insisted on the clause for an unlawful purpose. That such a clause might be lawful on its face, or capable of lawful application, does not excuse its use as a weapon to cause employers to engage in unlawful discrimination. *National Maritime Union* case, *supra,* 175 F. 2d, at 688–689; cf. *National Labor Relations Board* v. *American National Insurance Co.,* No. 126, Oct. Term, 1951, decided May 26, 1952, slip sheet op., pp. 9–10, note 15.

2. Petitioners do not challenge the Board's conclusion in the *Chicago* case, that Section 8 (b) (3) was violated by petitioners' initial refusal to enter into any contract. Nor do they challenge the Board's finding that the P–6A proposal was primarily designed to induce acquiescence in the no-contract policy as the lesser of two evils, and that petitioners insistence on P–6A was therefore also a refusal to bargain in violation of Section 8 (b) (3). Petitioners claim only that because the sixty-day termination provision in the P–6A proposal was lawful on its face, the Board erred in finding that petitioners' insistence upon it violated Section 8 (b) (3) (Pet., pp. 26–28). But the Board found, on the testimony, *inter alia,* of petitioners them-

selves, that the purpose of the sixty-day provision, which was simply a variant of petitioners' illegal no-contract policy, was to compel employers to maintain closed shop conditions in violation of the plain terms of the statute. Since, as the Board and the court below held, to bargain for a scheme which the statute outlaws is not to bargain collectively in good faith as the statute requires, petitioners' illegally motivated insistence upon the sixty-day termination provision was properly found to violate Section 8 (b) (3). *National Maritime Union,* 78 N. L. R. B. 971, 981–982, enforced, 175 F. 2d 686 (C. A. 2), certiorari denied, 338 U. S. 954.

3. Petitioner's assertion (Pet., pp. 20–26), that ITU was improperly found to be the joint bargaining representative, together with Local No. 16, of the ITU members in Chicago, poses nothing more than a challenge to the sufficiency of the evidence which supports the Board's finding, that the "record established the employees' designation of both [the ITU and its Chicago local] for the purposes of collective bargaining" in the Chicago metropolitan area (R. 344). Manifestly, by joining ITU the members authorized bargaining on their behalf pusuant to the arrangements set forth in the ITU's laws. Those arrangements, as the evidence clearly shows, sanction and contemplate participation in the bargaining process by the ITU as well

as by the locals. The Board's order, of course, does not require ITU to participate in the bargaining process to any greater extent than it has been authorized by the employees to do so (R. 348). In any event, the extent of the ITU's authorization poses only a factual issue, which does not warrant further review.[7]

4. Petitioners do not challenge the Board's finding that petitioners demanded not only that the foremen be union members but that they be empowered to adjust grievances on behalf of the employers. Petitioners claim, however, that their demand that only union foremen be hired was not supported by restraint or coercion, on the theory that their strike threat was not specifically directed to this demand (Pet. pp. 28–29). But the foreman demand was an integral part of petitioner's illegal scheme for maintaining closed shop conditions (*supra*, p. 17), which the employers resisted *in toto*. It is plainly immaterial, therefore, that, had petitioners' demand not been illegally motivated, the employers

[7] Petitioners' allied contention that ITU cannot be held responsible for refusing to bargain in good faith because "no Chicago publisher ever asked the ITU to engage in collective bargaining" (Pet., p. 25), is patently without merit. Throughout the negotiations, the employers directed their proposals and discussions to the employees through whatever representative, holding whatever authority, the employees had designated. In fact, negotiations were conducted with the President of the ITU as well as with the Chicago local (*supra*, p. 13).

might have been willing to employ union foremen exclusively. Since the strike threat was designed to compel the employers to acquiesce in petitioners' entire illegal scheme there is no basis for holding that the strike threat did not apply to this one aspect of it. There is no conflict of decisions on this point, and none is claimed.

5. Petitioners' final contention, that the court below erred in holding that the Board was empowered on the record in the ANPA case to decide whether ITU had refused to bargain collectively in violation of Section 8 (b) (3) (Pet., pp. 30–31), is based in part on the misconception that the charge and the complaint did not allege that ITU had itself refused to bargain collectively. Thus, petitioners assert that "No allegation was ever made that the ITU had refused to bargain collectively; the charge merely was that the ITU caused the locals to refuse to bargain" (Pet., p. 30). Actually, however, both the charge and the complaint alleged that the ITU had itself refused to bargain, in violation of Section 8 (b) (1) (A) of the Act (R. 41–42, 47). The court below found that the Board "apparently was under the impression that, since the particular action alleged was not alleged to be a violation of Section 8 (b) (3), it was required to dismiss this charge without passing upon the sufficiency of the proof" (R. 3082). It held that "the failure to specify in

the complaint the correct subsection of the Act did not require the Board to dismiss this charge without consideration as to the sufficiency of the proof" (*id.*).

This holding is manifestly correct and warrants no further review. The court below did not hold, as petitioners imply, that the Board may find a violation of Section 8 (b) (3) in the absence of evidence as to the appropriate unit or a request to bargain. It held only that where the complaint alleges that certain conduct violates the Act, and that allegation is fully litigated, the Board is not required to dismiss the complaint merely because it incorrectly specifies that the conduct violates one rather than another subsection of the Act.

Petitioners also claim (Pet., p. 30), that "before the Board, the ANPA uttered not one word to the effect that the ITU had violated Section 8 (b) (3)," and that Section 10 (e) therefore should have precluded the court below from considering the Board's disposition of the refusal to bargain issue. But ANPA did argue in its brief before the Board that ITU had violated Section 8 (b) (3) of the Act,[8] contending that the Board should therefore find that petitioners had violated Section 8 (b) (1) (A). Since ANPA did assert before the Board that ITU

[8] A copy of this brief is lodged with the clerk of this Court. The argument in point appears at pp. 39–41, 44 of the brief.

had unlawfully refused to bargain, we think, contrary to petitioners (Pet., p. 31), that the court below was not precluded by Section 10 (e) from considering the propriety of the Board's refusal to pass on the question whether the refusal to bargain violated Section 8 (b) (3).[9] In any event, petitioners' objection on this score is not properly before this Court. Neither petitioners nor the Board urged before the court below that the refusal to bargain issue, on which ANPA requested the court below to pass, had not been properly presented to the Board. Not having been raised before or considered or passed upon by the court below, the Section 10 (e) objection may not properly be presented here. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328–329; *United States* v. *Great Northern Railway Co.*, No. 151, Oct. Term, 1951, decided June 2, 1952, slip sheet op., p. 4, n. 3; *On Lee* v. *United States*, No. 543, Oct. Term, 1951, decided June 2, 1952, slip sheet op., p. 2, n. 3.

[9] Cf. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 386–387, n. 5, in which this Court stated that "Although it falls short of desirable specificity, we think the objection was sufficient in the present case."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the

United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the

failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1951

No. [redacted] 56

INTERNATIONAL TYPOGRAPHICAL UNION, ET ALS., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, ET ALS., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 758

INTERNATIONAL TYPOGRAPHICAL UNION, ET ALS., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, ET ALS., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN OPPOSITION.

OPINIONS BELOW.

The decisions and orders of the National Labor Relations Board[1] appear at pages 283 and 339 of the record and are reported in 86 N. L. R. B. at pages 951 and 1041.

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[1] The National Labor Relations Board will be referred to herein as the "Board"; the National Labor Relations Act, as amended, as the "Act"; the International Typographical Union and the individual petitioners collectively as the "ITU" and the General Counsel of the Board as the "General Counsel."

The opinion of the Court below appears at page 3053 of the record and is reported at 193 F. 2d 782.

JURISDICTION.

The judgments and decrees of the Court below were entered on February 11, 1952 (R. 3097-3110). The petition for a writ of certiorari was filed on May 9, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court below acted correctly in upholding the Board's decision that petitioners' conduct in seeking to compel publishers discriminatorily to exclude non-union men from employment violated Section 8(b)(2) of the Act in the absence of a showing that a named employee or applicant for work was discriminated against.

2. Whether the Court below acted correctly in upholding the Board's finding that petitioners attempted to cause publishers to discriminate against non-members of the ITU by adamantly refusing to sign any agreement unless it contained a 60-day cancellation clause.

3. Whether the Court below acted correctly in upholding the Board's finding that the ITU was a statutory bargaining representative.

4. Whether the Court below was justified in rejecting the claim that the ITU had not been requested to bargain in the light of the overwhelming evidence that the ITU and its agents had participated in bargaining in many cities.

5. Whether the Court below acted correctly in upholding the Board's finding that petitioners' insistence on a 60-day cancellation clause constituted a refusal to bargain.

6. Whether the Court below acted correctly in upholding the Board's decision that petitioners' threat to strike restrained and coerced publishers to accept one of their

demands where the strike threat was directed not only to that demand but also to several others.

7. Whether the Court below acted correctly in remanding to the Board that part of the Board's order which "dismissed the complaint insofar as it alleged that the International Typographical Union and its named agents refused to bargain collectively in good faith" (R. 3109).

STATEMENT.

This respondent, for the convenience of the Court, makes no separate detailed statement of the case but requests the Court to consider its statement in *American Newspaper Publishers Association*, Petitioner, v. *National Labor Relations Board*, Respondent, No. 755, October Term 1951, together with the statement of petitioners herein and the statement of the National Labor Relations Board in its opposition to the petition herein.

However, this respondent wishes to call to the attention of the Court that since its petition was filed in No. 755, the Court of Appeals for the Sixth Circuit in *Gamble Enterprises, Inc.* v. *National Labor Relations Board* reached a decision on the meaning of Section 8 (b)(6) of the Act directly contrary to that reached by the lower Court in the controversy on which the petition was filed in No. 755. While that issue is not involved in the petition herein (No. 758), it was one of the issues decided below which this Court was petitioned to review in No. 755 but as of this date this Court has not acted on the petition.

ARGUMENT.

1. Petitioners contend that a violation of Section 8(b)(2) of the Act can be established only by showing that a named employee or applicant for work has been discriminated against (Petition, pages 16-18). This contention flies squarely in the face of decisions from two other

circuits in respect of which this Court denied petitions for writs of certiorari.

> *N. L. R. B.* v. *National Maritime Union*, 175 F. 2d 686, 689 (C.A. 2, 1949); certiorari denied 338 U. S. 954 (1950); rehearing denied 339 U. S. 926 (1950). *International Union, United Mine Workers* v. *N. L. R. B.*, 184 F. 2d. 392, 393 (C.A.D.C. 1950); certiorari denied 340 U. S. 934 (1951).

In the *UMW* case, *supra*, the Court of Appeals for the District of Columbia said:

> " • • • it is urged that Section 8(b)(2) is limited to discrimination against a *specified* employee or group; • • • These and other contentions were resolved against the petitioners by the Board. We agree with its conclusions." (184 F. 2d page 393).

In the *NMU* case, *supra*, the Court of Appeals for the Second Circuit said:

> "Like the Board, we see no rational basis for respondents' argument that Section 8(b)(2) does not make it an 'unfair labor practice' to attempt to cause an employer to discriminate against a group of employees or potential employees but only against some specified employees or potential employees." (175 F. 2d at page 689).

There is no conflict in the Courts below on this issue and petitioners claim none. There has been no change in circumstances since this Court denied petitions for writs of certiorari in the *UMW* and *NMU* cases, and this respondent respectfully submits that the question sought to be raised is not one calling for the exercise of this Court's power of review.

2. Petitioners contend next that their adamant insistence upon the 60-day cancellation clause in Form P-6A did not constitute an attempt to cause publishers to discriminate in favor of ITU members since the clause on its face did

not require such discrimination (Petition, pages 18-20). In so doing they ignore the Board's finding based upon petitioners' own written statements that

> "* * * the 'P-6A' strategy was but a tactical maneuver, calculated, at the very least, to compel, as in the case of the 'Conditions' strategy, the non-contractual employer maintenance of 'closed-shop' conditions by the use of a continuing threat to strike" (R. 286).

The question of whether Section 8(b)(2) of the Act can be violated by insistence upon "agreements which on their face did not require discrimination" (Petition, pages 18-19) was presented to the Second Circuit and to this Court in *N. L. R. B.* v. *National Maritime Union*, 175 F. 2d. 686 (C.A. 2, 1949) certiorari denied 338 U. S. 954 (1950) rehearing denied 339 U. S. 926 (1950).

In that case the Court of Appeals quoted with approval the Board's statement that:

> "The hiring-hall provision in question does not on its face require that the Companies discriminate in favor of NMU members." (175 F. 2d. at page 688).

The Court then held that the demand for a hiring-hall provision, like the demand for a 60-day clause in this case, violated Section 8(b)(2) of the Act not because the provision was illegal on its face but because the Board had found that the demand was "calculated to cause the Companies * * * to continue to cooperate in the practices flowing from execution of this clause, as a result of which (union) members were given preference in employment over non-members." (175 F. 2d at page 689). That the 60-day clause was calculated to produce the same result was clearly shown in this case by the introduction of a circular distributed by petitioners with Form P-6A in which they said, *inter alia*, that

> "The right to terminate on 60-day notice is absolutely essential because:

> "It puts the employer in a position where he is likely not to have union employees working for him if he hires non-union men; * * *" (R. 2075. Quoted in part by the Board and by the Court below in their decisions R. 286, 3070).

The question sought to be raised is essentially one of fact rather than one of law and the decision of the Court below does not call for the exercise of this Court's power of review.

3. Petitioners contend that the ITU has not been selected as a bargaining representative and that the Court below therefore erred in holding it to be one (Petition, pages 20-25). In making this contention petitioners seek to challenge the Board's finding (R. 344) accepted by the Court below (R. 3092-3093) that the employees involved had designated the ITU together with their local for the purposes of collective bargaining. This finding is not one which warrants further review by this Court.

> "The N. L. R. B. is preeminently qualified to decide who is the proper representative of a given group of employees" (*N. L. R. B.* v. *E. A. Laboratories*, 188 F. 2d. 885, 888 (C.A. 2, 1951)).

Courts have uniformly relied on its findings in such matters. Furthermore the facts set forth in the Intermediate Report (R. 55-118, 314) give overwhelming support not only to the reasoning of the Trial Examiner (R. 317, n. 5) which the Board adopted (R. 344) but also to the Board's additional conclusion that participation in bargaining by ITU officials "reflected both the exercise by the International of a specific grant of bargaining authority and affirmation by the Local and its members of the existence of such authority" (R. 344).

4. Petitioners contend that the ITU cannot be responsible for its failure to bargain in good faith for the reason that "no request to bargain has ever been addressed to it by

an employer" (Petition, pages 25-26). In so doing they ignore voluminous evidence in the record that publishers met with International representatives in bargaining sessions at countless cities including Chicago (R. 84), Detroit (R. 96), New Bedford (R. 102), Columbus, Georgia, (R. 103), Jamestown, New York (R. 105), Rockville Center, New York (R. 106) and New York City (R. 114).

While it is true that a person cannot be said to have refused to bargain where bargaining "is not proffered," *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 298 (1939), this Court has indicated that the "indication" of a "desire or willingness to bargain" constitutes a sufficient request, *ibid.* at pages 297-298. In considering the form such a request should take the Court of Appeals for the District of Columbia has said:

> "Nor must the request to bargain be in *haec verba*, so long as there was one by clear implication. The Labor-Management Relations Act 'is not a statute of frauds or an act prescribing the formalities of conveyancing. No seal or writing is required by its terms. Nor is any specific formula or form of words.'" *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d. 732, 741 (C.A. D.C. 1950).

On the facts of this case there can be no doubt that publishers by meeting with International officials and by the other acts gave a clear indication of their desire and willingness to bargain with petitioners. The decision of the Court below was clearly correct.

5. Petitioners contend that their insistence upon a 60-day cancellation clause did not constitute a refusal to bargain since the clause was "lawful on its face and capable of lawful application" (Petition, pages 26-28). This contention does not merit a review by this Court.

The Board recognized that "A refusal to agree to a term of 1 year, or of any other particular duration, does not per se constitute a refusal to bargain" (R. 320). It pointed

out, however, that "the primary objective of collective bargaining is to stabilize labor relations for periods of reasonable duration" and that in this case "the parties had, before 1947, traditionally bargained for and executed contracts for a fixed duration of 1 year" (R. 342). It stated that petitioners' "unwillingness to consider the traditional term, evidenced by their refusal to bind themselves contractually for more than 60 days, raises in and of itself a presumption that the (petitioners) were not bargaining in good faith" and it found "no lawful or reasonable economic justification for such a refusal" (R. 342). Rather it found that by this clause petitioners "intended to place themselves in a position whereby they could with contractual impunity call a strike" (R. 342).

In holding that "insistence, in the absence of special circumstances, by an employer or a union upon a contract of indefinite duration terminable upon relatively short notice may evidence a bad faith approach to the collective bargaining process" (R. 320) the Board (See R. 339, 341-342) followed established procedents (R. 342, n. 5; R. 320, n. 8) and its decision was properly upheld by the Court below. Such a rule is a necessary concomitant of this Court's rule that a refusal to reduce a contract to writing violates the Act, *Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 523-526 (1941). In the absence of such a rule a party could readily evade the policy of the *Heinz* case, *supra*, by insisting upon a 60-day or 30-day or 1-day contract.

This is not a case where the Board has sought to "pass upon the desirability of the substantive terms of labor agreements;" rather it is one in which the Board has enforced the duty to bargain collectively "by application of the good faith bargaining standards of Section 8(d) to the facts" of the case having due "regard to the traditions of bargaining in the particular industry." *N. L. R. B.* v. *American Insurance Co.*, No. 126, October Term 1951, (decided May 26, 1952). The only question is whether petitioners were willing to bind themselves for a period of

reasonable duration—a question of fact which the Board correctly decided and which the Court below properly upheld.

6. Petitioners contend that "no strike threat was ever directed toward" their demand that publishers hire only union foremen and their further demand that publishers delegate to such foremen the authority to hire and fire and the duty to represent the publisher in all grievance matters (Petition, pages 28-29). In so doing they attack the Board's finding supported by substantial evidence and upheld by the Court below that petitioners "threatened strike action—a coercive tactic calculated and designed to force the Employers to capitulate to the foreman demands" (R. 292).

Petitioners assert that their threats to strike were directed not toward their foreman demands but to other demands. In so arguing petitioners attack the further finding also supported by substantial evidence that

> "• • • the requirement (contained in ITU laws, and specifically provided for in the 'Conditions of Employment' form which was referred to in 'Policy' itself) that ITU members work only under ITU foremen, constituted an inseparable part of the ITU program • • •" (R. 127).

As stated by the Court below, petitioners' "insistence on union foremen was a very important part of their scheme" and "their threat of strike action was directed to the enforcement of the entire scheme" (R. 3094). A strike threat clearly constitutes coercion within the meaning of the Act whether it is directed to one issue or to a number of issues on no one of which will the union yield.

Finally petitioners argue that the Board erred in finding that publishers were restrained and coerced because there was no showing that any publisher objected to the ITU requirement that only union foremen be hired (Petition, page 39). In so arguing they attack the Board's ruling

"in accord with innumerable precedents" (R. 292, 127) that "the existence of coercion within the meaning of the law does not depend upon a determination of the actual effect of such coercion in a particular case" (R. 292).

No one of these contentions warrants further review by this Court.

7. Petitioners' final contention is (Petition, pages 30-31) that the Court below erred in remanding "for consideration and decision upon the merits of the charge" (R. 3096) that part of the Board's order "which dismissed the complaint insofar as it alleged that the International Typographical Union and its named agents refused to bargain" (R. 3109). Petitioner asserts that Section 10(e) of the Act forbids such action for the reason that

> "No allegation was ever made (before the Board) that the ITU had refused to bargain collectively; the charge merely was that the ITU caused its locals to refuse to bargain." (Petition, page 30).

In arguing thus petitioners ignore the clear state of this record. The charge alleged that the ITU was "refusing itself to bargain collectively in good faith" (R. 42) and the complaint alleged that the ITU and its named officers were "refusing to bargain collectively in good faith with a substantial number of the companies where respondent International Typographical Union was" collective bargaining representative (R. 47).

Petitioners were fully apprised of the charge against them. The issue was fully litigated, and the Court below properly concluded that the Board erred in failing "to make a finding and an appropriate order on the allegation of the complaint that the ITU and its agents had failed to bargain collectively in good faith" (R. 3087).

CONCLUSION.

As hereinbefore pointed out, the petition herein was filed to obtain a review of those portions of the lower Court's order adverse to petitioners and the petition in No. 755 was filed to obtain a review of two issues decided by the lower Court in favor of petitioners herein.

On one of the issues involved in No. 755, there is a clear cut conflict between the decision of the lower Court and the decision of another Court of Appeals which has not yet been resolved by this Court.

On the other issue involved in No. 755, there is, in the opinion of this respondent, a clear cut conflict between the decision of the lower Court and a decision of this Court.

No such conflict appears in respect of any of the questions raised by petitioners herein and they have not claimed or shown any conflict.

In the opinion of this respondent, the questions which petitioners seek to raise were correctly decided by the Court below and do not warrant further review by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 88

INTERNATIONAL TYPOGRAPHICAL UNION, ET AL., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRITS OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 56

INTERNATIONAL TYPOGRAPHICAL UNION, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRITS OF CERTIORARI

Petitioners submit this reply brief to call the Court's attention to the fact that the decision below is inconsistent with and contrary to this Court's decision in *Labor Board* v. *American National Insurance Co.*, No. 126, O.T. 1951, decided May 26, 1952, subsequent to the filing of the petition for writs of certiorari in this case. Petitioners also desire to point out certain erroneous and unfair statements appearing in the brief in opposition submitted by the Solicitor General.

1. Petitioners have raised two *legal* issues relating to Section 8 (b) (2) of the Taft-Hartley Act—(a) whether the section can be violated absent a discriminatory scheme directed to a specific, identifiable employee, and (b) whether the section can be violated where a union proposes a lawful clause which is capable of either lawful or unlawful application.

In answer to issue (a), the Solicitor General has merely

adopted by reference his response on this point in opposition to the petition for writ of certiorari in *Labor Board* v. *National Maritime Union,* 338 U.S. 954, No. 488, O.T. 1949, pp. 14-17. Reference to that response reveals the lack of substance in the Government's argument. The Government there did little more than rely upon certain Wagner Act decisions, appearing once again in footnote 20, page 6, of the response in this case. Those decisions purportedly held that an employer violated Section 8 (3) merely by entering into an illegal closed shop agreement, it not being necessary that a specific person had been discharged or refused employment.

But the undeniable fact is that in each of those cases specific, identifiable persons were involved and overt acts of discrimination had occurred. Thus in *Labor Board* v. *National Motor Bearing Co.,* 105 F. 2d 652 (C.A. 9), 56 specific individuals were the victims of the employer's discriminatory action. In *Donnelly Garment Co.,* 50 N.L.R.B. 241, the Board and the Trial Examiner were referring to the 1200 identifiable employees in speaking of the discriminatory effects of the closed shop contract. And in *Highway Trailer Co.,* 3 N.L.R.B. 591, three named employees were discharged as the result of discriminatory action under a closed shop contract. Moreover, in each of these cases there were alternative grounds of decision, making more dicta out of the statements torn from context and relied upon by the Government.

The truth of the matter is, as stated by a Trial Examiner in *Amalgamated Meat Cutters,* 81 N.L.R.B. 1052, 1085, that "An illegal closed shop under the old Act has not, to my knowledge, been found to constitute a violation of Section 8 (3) unless and until there has been some overt action taken pursuant to the illegal provision which amounts to actual discrimination. The same logic, I think, applies to Section 8 (b) (2) of the amended statute. If the execution of

an illegal closed shop contract was not violative of Section 8 (3) of the old Act until it had been enforced against some individual or group of individuals, it could hardly be reasoned with consistency that the mere attempt to cause an employer to enter into a closed shop contract violates Section 8 (b) (2) of the Taft-Hartley Act." Nothing that the Board said in overruling this statement of the Trial Examiner proved its inaccuracy.

In answer to issue (b), the Solicitor General states that since the Board found that the petitioners insisted upon the sixty-day cancellation clause for an unlawful purpose it is immaterial that the clause might have been used for a lawful end. This answer completely misconceives the nature of petitioners' argument. Assume that petitioners did have such an unlawful purpose in mind. Is it illegal for them to bargain for a perfectly lawful clause that conceivably might some day be the vehicle for executing that purpose or that might also be used for lawful aims? Does merely asking for such a clause rise to the level of an "attempt to cause discrimination" within the meaning of Section 8 (b) (2)? Is something more than evil intent required to violate Section 8 (b) (2)? Those are the questions that the Solicitor General avoids. Those are the questions that are of such vital importance to collective bargaining as to justify review by this Court. Those are the questions left unanswered by the *National Maritime Union* case, 175 F. 2d 686 (C.A.2), cert. denied, 338 U.S. 954.[1]

2. The Solicitor General's bland statement that the extent of the ITU's bargaining authority raises only a factual issue deliberately ignores petitioners' position in its entirety. Petitioners do not desire to relitigate any factual matters before this Court. They desire only to question the

[1] The *National Maritime Union* case is readily distinguishable from the instant one. There, unlike here, past history demonstrated that the clause in question had in fact been used in an unlawful manner. Here the record is clear that no unlawful discrimination ever resulted in those instances where the sixty-day clause was adopted.

legality of the criteria which the Board utilized in arriving at the dangerous conclusion that the ITU could be a bargaining agent of employees who had never designated it as such. The dissenting opinion of the Board members on this point is alone enough to demonstrate that legal rather than factual issues are at stake, issues which are not met by the Solicitor General's response.

3. The Solicitor General seeks to answer petitioners' contention that the ITU could not be held to have violated Section 8 (b) (3) in the absence of a request to bargain by asserting that throughout the Chicago negotiations the employers directed their proposals and discussions to whatever representative, holding whatever authority, the employees had designated. This answer is patently without merit. The record is uncontradicted that the ITU President was at the negotiations solely in discharge of his duty under union law (R. 1674) to respond to a local union's call to investigate the cause of disagreement and endeavor to adjust the difficulty with the employers. That limited capacity was so understood by the employers (R. 541). At no time did any one ever consider the ITU President to be the bargaining agent of Local No. 16. And no request to bargain was ever addressed to him or to any other officer of the ITU.

4. The decision below, in holding that the ITU and Local No. 16 violated Section 8 (b) (3) by advancing a proposal lawful on its face and capable of lawful application, is directly inconsistent with this Court's subsequent decision in *Labor Board* v. *American Insurance Co.*, No. 126, OT 1951, decided May 26, 1952. The Board held that the ITU and Local No. 16 were bargaining for a scheme outlawed by statute and that their request for a sixty-day cancellation clause was illegally motivated. In so doing, the Board relied on what it thought was a lack of economic justification for the clause. It then reasoned that the desire for the clause must have been motivated by an unlawful urge for

a closed shop. It is precisely this type of reasoning that this Court condemned in the *American National Insurance* case. This Court there warned (slip opinion, p. 9) that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." Yet the Board did sit in judgment upon the substantive terms of the sixty-day clause in this case when it determined that there was no economic justification for it. It passed judgment on the union's contention that the clause was necessary in the light of the rising cost of living and the possibility that the employer might use unlawful means to destroy the union (R. 2580). In so doing, it acted beyond the scope of its power as delineated in the *American National Insurance* case.

The Board did more than sit in judgment on the sixty-day cancellation clause. By holding that the proposal of such a clause was illegal, even in the complete absence of proof that it ever was used for an unlawful purpose, the Board has compelled all ITU locals to make contracts of more than sixty days' duration. In other words, once the other terms of the contract have been settled, employees are forced to work for more than sixty days without the right even to ask for the privilege of cancelling the contract during that period. The period during which the employees may not terminate the contract presumably extends for at least a year.

The employees have thus been ordered, contrary to their rights under the Thirteenth Amendment, to offer and to perform their labor for a period of no less than a year. Such a result is plainly outlawed by the Constitution, the statute and a decent regard for the dignity of the individuals involved. As stated by this Court in the *American National Insurance* case (slip opinion, pp. 6-7), the Taft-Hartley Act does not "regulate the substantive terms governing wages, hours and working conditions which are in-

corporated in an agreement." But the Board has done that in this case, thereby warranting review and reversal by this Court.

5. Petitioners have urged that the court below was precluded by Section 10 (e) from considering the Board's disposition of the Section 8 (b) (3) issue in the ANPA proceeding. The basis for that claim is the fact that neither before the Board nor the court below did the ANPA argue that the ITU had violated Section 8 (b) (3) of the Act.

The Solicitor General now claims that the ANPA did so argue and that the ITU is precluded from raising its objection because it failed to raise it before the court below. This claim of the Solicitor General is a manifest distortion of the facts and represents an unwarranted repudiation of the position taken by the Board in the court below. It was that position which the ITU relied upon and adopted and which was reasonably thought to make it unnecessary to repeat the argument before the Court of Appeals.

Reference need only be made to the brief submitted by the Board in the court below,[2] a brief which accurately states and restates that "the complaint neither alleged a violation of Section 8 (b) (3) nor alleged sufficient facts to put in issue a violation of that section of the statute" (p. 32). It was further noted (p. 31) that "As framed by the complaint (R. 47) and by the charge filed by [the ANPA] (R. 41), the 'basic issue' was not . . . 'whether the ITU had refused to bargain in good faith with publishers,' but whether the ITU had restrained and coerced employees as alleged."

The record is clear in this respect. At no point prior to the argument before the Court of Appeals was it alleged or argued that a violation of Section 8 (b) (3) was in issue. The original charges filed by the ANPA made no reference to Section 8(b) (3). R. 41-42. The complaint likewise con-

[2] A copy of this brief is lodged with the clerk of this Court and the full argument on this score appears at pp. 28-32 thereof.

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tained no such reference. R. 43-48. The Trial Examiner's report (R. 50-166) indicated that Section 8 (b) (3) was not under consideration. The ANPA's exceptions to this report were equally devoid of any reference to the section (R. 180-193). Only in an offhand manner in the ANPA's brief to the Board is there any mention of Section 8 (b) (3). That brief, of course, is not a part of the record and cannot serve as a legitimate means of raising an issue. See *Live Oak Assn.* v. *Railroad Comm.* 269 U.S. 354, 357-8; *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54.

But even taking the brief at its face value, it is readily apparent that the ANPA was arguing only that a refusal to bargain collectively violated Section 8 (b) (1) (A)—as charged in the complaint—and that its references to Section 8 (b) (3) were purely gratuitous. No real effort was made to urge what had not been put in issue—namely, a violation of Section 8 (b) (3). And the Board so considered the case, feeling that it had no occasion to decide that issue. It decided only that an alleged refusal to bargain was not a violation of Section 8 (b) (1) (A).

Thus when the case reached the Court of Appeals, that court had no jurisdiction under Section 10 (e) to consider the belatedly-urged Section 8 (b) (3) issue, an issue which had not been urged before the Board. See *Labor Board* v. *Newberry Lumber Co.*, 124 F. 2d 831, 839 (C.A. 6). This being a jurisdictional defect, petitioners are free to raise it at any point in this proceeding. *Matson Nav. Co.* v. *United States*, 284 U.S. 352; *Gainesville* v. *Brown-Crummer Invest. Co.*, 277 U.S. 54; *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57.

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